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No. 82-1314

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1982 TERM

GREGORY RICHARD FOGARTY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the period during which his co-defendants' pre-trial motions were pending should have been automatically excluded from the defendant's seventy-day time limit for commencement of trial under the Speedy Trial Act.

2. Whether the trial court violated the dictates of the Speedy Trial Act by delaying the defendant's trial for thirty days, supposedly to serve the "ends of justice," though the defendant and the Government were fully prepared and stood ready to go to trial with no delay.

3. Whether a fifty-day delay in commencing the defendant's trial was unreasonable under Section 3161(h)(7) of the Speedy Trial Act and violated his constitutional right to a speedy trial, where the defendant demanded a prompt trial and where both the defendant and the Government were fully prepared and stood ready to proceed to trial with no delay.

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QUESTIONS PRESENTED FOR REVIEW

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2. Whether the trial court violated the dictates of the Speedy Trial Act by delaying the defendant's trial for thirty days, supposedly to serve the "ends of justice," though the defendant and the Government were fully prepared and stood ready to go to trial with no delay.

3. Whether a fifty-day delay in commencing the defendant's trial was unreasonable under Section 3161(h)(7) of the Speedy Trial Act and violated his constitutional right to a speedy trial, where the defendant demanded a prompt trial and where both the defendant and the Government were fully prepared and stood ready to proceed to trial with no delay.

REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 692 F.2d 542 (8th Cir. 1982), and attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

On November 10, 1982, the United States Court of Appeals for the Eighth Circuit filed its opinion in the instant case, affirming the district court's judgment. On December 9, 1982, the United States Court of Appeals for the Eighth Circuit entered its Order denying Defendant's Petition for Rehearing. 28 U.S.C. Section 1254 confers on this Court jurisdiction to review the decision of the court of appeals by Writ of Certiorari.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

(1) U.S. CONST. Amend. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(2) 18 U.S.C. Section 3161(c)(1): In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever

date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(3) 18 U.S.C. Section 3161(h): The following periods of delay shall be excluded in computing the time within which an informtion or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to --

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from

trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transporation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(4) 18 U.S.C. Section 3161(h)(7): A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(5) 18 U.S.C. Section 3161(h)(8): (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless

the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (a) of this paragraph in any case are as follows:

(i) Whether the failure to grant suh a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

IN THE
UNITED STATES SUPREME COURT
No. _____
OCTOBER 1982 TERM

GREGORY RICHARD FOGARTY,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI ON APPEAL
FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

On January 20, 1980, an aircraft transporting marijuana landed in South Dakota and was seized by law enforcement officers.

In connection with this incident, a federal grand jury handed down an indictment on August 19, 1981, charging Petitioner Gregory Richard Fogarty with one count of conspiracy to import marijuana in violation of 21 U.S.C. Sections 952(a) and 963, and one count of conspiracy to possess marijuana with the intent to distribute in violation of 21 U.S.C. Sections 841(a)(1) and 846. Federal jurisdiction in the United States District Court for the District of South Dakota, Northern Division, was based on 18 U.S.C. Section 3231 and Fed.R.Crim.P. 18. Petitioner was arraigned before the Honorable Carlyle E. Richards, United States Magistrate, on September 8, 1981. In a letter dated October 7, 1981, Special Assistant U.S. Attorney James McMahon advised the Honorable Donald J. Porter, United States District Court Judge for the District of South Dakota, Northern

Division, that the Speedy Trial Act deadline for trial was November 16, 1981 (see Appendix C). Mr. McMahon further indicated in his letter that "it is our position that the trial should be held before that date unless defense counsel are successful on a Motion to Continue." Nonetheless, on November 2, 1981, in the absence of any ruling on motions to continue, Judge Porter scheduled the trial of Petitioner and his co-defendants for December 7, 1981.

During late October and early November, three co-defendants filed motions to continue the trial, but Petitioner specifically did not join in any of these motions. In the Government's response to the co-defendants' motions for continuance, Mr. McMahon stated that "Defendants Halgrimson, Maiers, and Dennis Fogarty have moved for a continuance. The Government is prepared and stands ready

to go to trial in this matter on December 7, 1981." (See Appendix D; emphasis added.)

On November 16, 1981, Petitioner filed a motion to dismiss the indictment for failure to comply with the Speedy Trial Act of 1974, 18 U.S.C. Sections 3161-3174 (1976), and a motion to sever his trial from that of the other defendants. Prior to hearing these motions, Judge Porter granted the three co-defendants' motions to continue the trial and delayed the trial of all defendants from December 7, 1981 until January 6, 1982 (Order of November 24, 1981). On December 10, 1981, Judge Porter heard and denied Petitioner's motion to dismiss and motion to sever and reaffirmed his decision to continue the trial date of all defendants, including Petitioner, from December 7, 1981 until January 6, 1982 (see Appendix B).

On January 6, 1982, Petitioner's co-defendants pled guilty under plea bargain

agreements. On the same day, Petitioner was tried at a bench trial before Judge Porter pursuant to stipulated facts and was convicted on all charges. At trial, Petitioner specifically preserved his right to raise the Speedy Trial Act issue on appeal.

ARGUMENT

I. THE SPEEDY TRIAL ACT REQUIRES DISMISSAL OF THE INDICTMENT AGAINST PETITIONER.

The Speedy Trial Act, 18 U.S.C. Sections 3161-3174, was enacted to effectuate the Sixth Amendment's speedy trial requirement by guaranteeing prompt consideration and disposition of criminal cases. The Act sets forth strict time limits within which a defendant's indictment, arraignment and trial

must occur, and mandates sanctions for violation of those time limits. Specifically, 18 U.S.C. 3161(c)(1) reads in pertinent part:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. (Emphasis added.)

The prescribed sanction for failure to comply with the strict terms of this section is contained in 18 U.S.C. Section 3162(a)(2):

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. (Emphasis added.)

According to 18 U.S.C. Section 3163(c), this sanction of dismissal applies with full effect to all indictments filed on or after

July 1, 1980. Thus, the mandates of the Act are to be strictly applied in the instant case.

The Eighth Circuit properly calculated that since Mr. Fogarty's arraignment occurred on September 8, 1981 and started his seventy-day count, a timely trial would have begun on November 16, 1981, barring periods of excludable delay. United States v. Fogarty, 692 F.2d 542, 545 (8th Cir. 1982). While Mr. Fogarty's trial did not actually commence until 120 days after his arraignment, the Eighth Circuit concluded that two of the"excludable time" provisions of Section 3161(h) of the Act applied in Petitioner's case to bring his trial within the seventy-day limit. 692 F.2d at 545, 546. Petitioner contends that neither of those provisions are applicable in his case, and that the fifty-day delay in the commencement of his trial was

unreasonable under the circumstances of his case.

A. The period during which his co-defendants' pretrial motions were pending should not have been excluded from Petitioner's seventy-day time limit for commencement of trial.

Citing United States v. Brim, 630 F.2d 1307, 1312-13, (8th Cir.), cert. denied, 452 U.S. 966 (1980), the Eighth Circuit concluded that Section 3161(h)(1)(F) (as amended 1979) of the Speedy Trial Act requires automatic exclusion of the sixty-one days during which co-defendants' pretrial motions were continuously pending. 692 F.2d at 545. In Brim, however, the defendant's deadline period was tolled by motions brought by Brim and by Government motions directly relating to Brim. A thorough examination and analysis of the language of Section 3161(h) reveals that

Section 3161(h)(1)(F) was not meant to apply to motions brought by, and related to, co-defendants:

> (h) The following periods of delay shall be excluded in computing the time within which . . . the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to --
>
> (A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;
>
> (B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;
>
> (C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;
>
> (D) delay resulting from trial with respect to other charges against the defendant;
>
> (E) delay resulting from any interlocutory appeal;
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing

> on, or other prompt disposition of, such motion;
>
> * * *

(Emphasis added)

In the instant case, Petitioner's co-defendants filed pretrial motions on October 15, 1981. The Eighth Circuit obviously concluded that these pretrial motions "concerned the defendant" Fogarty for purposes of Section 3161(h)(1)(F) and required the tolling of Mr. Fogarty's seventy-day count as of October 15, 1981. However, it is clear from a reading of the statute's examples of "other proceedings concerning the defendant" that pretrial motions of co-defendants do not toll the running of a defendant's seventy-day count. Rather, the examples within the statute refer to other proceedings which directly involve the particular defendant, himself.

Further, an examination of Section 3161(h)(7) confirms this interpretation. That section provides:

> (h) The following periods of delay shall be excluded in computing the time within which . . . the trial of any such offense must commence:
>
> > (7) A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted.

Citing United States v. Edwards, 627 F.2d 460, 461 (D.C. Cir.), cert. denied, 449 U.S. 872 (1980), and United States v. Manbeck, 514 F.Supp. 152, 154-55 (D. S.C. 1981), the Eighth Circuit interpreted this section to mean that an exclusion applicable to one defendant applies to all co-defendants. 692 F.2d at 546. In fact, the inclusion of this section along with Section 3161(h)(1)(F) clearly reflects just the contrary. If the "other proceedings concerning

the defendant" of Section 3161(h)(1) automatically included all proceedings of co-defendants, Section 3161(h)(7) would be redundant and unnecessary; there would be no need for reference to a "reasonable delay" because a defendant's trial deadline would always track precisely with the latest deadline applicable to any of his respective co-defendants.

The delay from October 15, 1981 until December 22, 1981, occasioned by the co-defendants' continuance motions should not have been excluded in computing Mr. Fogarty's seventy-day count. Rather, that delay was only excludable as to the co-defendants who brought the motions. These motions did toll the running of the co-defendants' seventy-day counts so that the time for their trials had not run on November 16, 1981. However, under Section 3161(h)(7), this only meant that a "reasonable period of delay" could be added

to Mr. Fogarty's seventy-day count without violating his constitutional right to a speedy trial.

B. The trial court violated the dictates of the Speedy Trial Act by delaying Petitioner's trial for thirty days, supposedly to serve the "ends of justice," though Petitioner and the Government were fully prepared and stood ready to go to trial with no delay.

The Eighth Circuit also concluded that the "excludable time" provision of Section 3161(h)(8)(A) applied in the instant case to the thirty-day delay resulting from the district court's continuance of the trial date from December 7, 1981 to January 6, 1982. 692 F.2d at 546. Section 3161(h)(8)(A) empowers the judge to grant a continuance motion if he finds that the "ends of justice" so require. On November 24, 1981, the trial court granted co-defendants' motions for con-

tinuance and reset the trial of all defendants for January 6, 1982. However, while this thirty-day delay may properly be excluded from the co-defendants' seventy-day counts, it certainly should not be excluded from Mr. Fogarty's time limit for trial.

As the Eighth Circuit noted in its opinion, 692 F.2d at 546, under Section 3161(h)(8) such a continuance is properly excluded from the computation of trial days

> if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. Section 3161(h)(8)(A) (emphasis added). The "ends of justice" are often served by a delay when further time is needed in order to ensure adequate preparation for trial by both sides. See Sections 3161(h)(8)(B)(ii) and (iv). Indeed, this was the basis

for the continuance sought by the co-defendants in the instant case, and this was the basis on which the trial court continued the trial date for all defendants, including Petitioner. 692 F.2d at 546. However, these considerations have nothing to do with the defendant, Mr. Fogarty. He did not join in the co-defendants' motions for continuance. He made every effort to have his case heard within the seventy-day period prescribed by the Act. Nor did the Government require this thirty-day continuance in order to fully prepare for Mr. Fogarty's trial, as is evidenced by the Government's response to the co-defendants' motions for continuance, wherein it was stated that "[t]he Government is prepared and stands ready to go to trial in this matter on December 7, 1981." As to Mr. Fogarty, the ends of justice were in no way served by a continuance of his trial, and the

thirty-day delay until January 6, 1982, should not be deemed "excludable time" within the time limit for his trial.

Moreover, the continuance from December 7, 1981 to January 6, 1982 had no validity as to Mr. Fogarty because it was granted after his applicable trial deadline had passed. His deadline for trial was November 16, 1981. He was ready for trial by that day, as was the Government, and he had indi-cated his desire for a prompt trial by moving on November 16, 1981 to dismiss for failure to bring the case promptly to trial and by moving to sever his trial from that of the co-defendants who were seeking a continuance. However, on November 24, 1981, the trial court issued an Order continuing Fogarty's trial date from its proposed December 7, 1981 date to January 6, 1982, pursuant to Section 3161(h)(8). It is improper for a court to

grant permission for such an extension after a defendant's applicable trial deadline has passed, and this continuance was invalid as to Mr. Fogarty. United States v. Didier, 542 F.2d 1182, 1189 (2d Cir. 1976); accord, United States v. Mack, 511 F.Supp. 802, 803 (D.C. Mass. 1981). With regard to Petitioner, the fifty-day delay between November 16, 1981 and January 6, 1982 in no way served "the ends of justice." Rather, this delay simply thwarted the best interests of the public and the defendant in a speedy trial, and violated the spirit and the letter of the Speedy Trial Act.

C. Continuance of the trial date to January 6, 1982 represented an unreasonable period of delay under Section 3161 (h)(7) of the Speedy Trial Act and denied Petitioner his constitutional right to a speedy trial.

Section 3161(c)(1) of the Speedy Trial Act required that Fogarty's trial commence within seventy-days of his arraignment on September 8, 1981. Pursuant to Section 3162(a)(2) of the Act, the prescribed sanction for failure to comply with the strict terms of this time limit is dismissal of the indictment. The sanctions of the Act are to be strictly applied. Thus, in United States v. Mack, 511 F.Supp. 802 (D.C. Mass. 1981), an indictment was dismissed with prejudice when the defendant filed a motion for dismissal forty-five days after his statutory trial deadline had expired. 511 F.Supp. at 803. See also, United States v. Garza, 502 F.Supp. 537 (D.C.S.D. Tex. 1980). Because three of Fogarty's co-defendants filed pretrial motions on their own behalves in October and November of 1981, those co-defendants' respective deadlines for trial were properly

extended beyond November 16, 1981, pursuant to Section 3161(h)(1)(F). As to Defendant Fogarty, this circumstance meant that the trial court might properly add to his seventy-day deadline "a reasonable period of delay," pursuant to Section 3161(h)(7). The totality of the circumstances reflect that the fifty-day delay suffered by Mr. Fogarty was unreasonable and that his Sixth Amendment right to a speedy trial was denied.

The United States Court of Appeals for the Second Circuit shed considerable light on this "reasonableness" standard in its discussion in United States v. Didier, 542 F.2d 1182 (2d Cir. 1976). As in this case, Didier's trial was delayed a number of times because of circumstances involving his co-defendants. Initially, the Government wished to postpone Didier's trial until disposition of a co-defendant's appeal on another charge

in another jurisdiction. Later, further delay occurred when the same co-defendant disappeared and could not be relocated for trial. Meanwhile, Didier had brought a motion to dismiss his indictment for failure to promptly commence his trial. The trial court denied his motion, holding that the delays in commencing Didier's trial were justified by the circumstances surrounding the co-defendant. 542 F.2d at 1185. The Second Circuit concluded that these delays in commencement of Didier's trial were unreasonable and remanded his case for dismissal of the indictment.

> Upon being put on notice by appellant's June 30th motion [to dismiss] that he was in effect demanding a prompt trial and then being further advised on July 17th that [the co-defendant] had probably gone fugitive, the district court should have sua sponte severed appellant's case for immediate retrial. (Emphasis added).

542 F.2d at 1188. Later in the same opinion, the court again emphasized that a motion by a defendant to dismiss for failure to bring his case promptly to trial represents an indication on his part of his desire for a prompt trial, 542 F.2d at 1189, and the court must consider this desire in determining the reasonableness of further delay.

In accord is United States v. Lasker, 481 F.2d 229 (2d Cir.), cert. denied, 415 U.S. 975 (1973). In outlining the proper procedures to follow under a court rule which, precisely like Section 3161(h) (7), allowed for reasonable delay when a defendant was joined for trial with a co-defendant whose time for trial had not yet run, the court adopted the following approach:

> 1. Determine whether the defendant is joined with a co-defendant as to whom the [time limit] has not run;

> 2. If the first requisite is met, determine whether any further delay would be unreasonable under the circumstances -- not determine retroactively whether the previous delay was unreasonable; and
>
> 3. Determine whether independently of the reasonableness of future delay, there is good cause for a severance. If the court determines either that further delay would be unreasonable or that there is good cause for a severance, . . . it should then sever the defendant's case so that defendant's [time limit] would henceforth run independently of his co-defendant. (Emphasis added).

481 F.2d at 233-34. In the Lasker case, the Second Circuit concluded that the trial court had acted improperly:

> [I]t should have found that, under the circumstances of [co-defendant's] likely continued unavailability, any further delay under the auspices of Rule 5(e) [i.e., the "reasonable period of delay" rule] would have been unreasonable and thus should have severed [co-defendant] from each defendant's indictment so that trial could proceed forthwith, as the government assured the court it was pre-

pared to do. (Emphasis added).

481 F.2d at 234.

As in Didier and Lasker, the totality of the circumstances indicate that Mr. Fogarty's trial was unreasonably delayed and that he was denied his constitutional right to a speedy trial. Fogarty was arraigned on September 8, 1981, as were his co-defendants. He should have been tried by November 16, 1981. Both Fogarty and the Government were ready to commence trial by November 16th. While his co-defendants brought motions in mid-October and early November to continue their trials to a later date, Fogarty did not join in these motions but sought severance and a speedy trial instead. Nonetheless, on November 2, 1981, even before it had ruled on the co-defendants' motions to continue, the trial court set December 7, 1981 as the trial date for all defendants, including Fogarty.

This date, of course, was well beyond his seventy-day deadline of November 16, 1981. On November 16th, Fogarty filed his own motions to dismiss his indictment for failure to comply with the Speedy Trial Act and sever his trial from that of the other defendants. With these motions, he again indicated his desire for a prompt trial. United States v. Didier, 542 F.2d at 1189. At the same time, the Government was prepared and ready to proceed to trial against Mr. Fogarty. However, the trial court not only refused to sever Fogarty's trial and commence immediately, but on November 24, 1981, further continued his trial and that of his co-defendants to January 6, 1982. [It is perhaps not insignificant that Fogarty's four co-defendants, who claimed they needed a continuance to prepare for trial, all pled guilty to charges on January 6, 1982, and Fogarty was tried alone

on that date, fifty days after the deadline for his trial which both he and the Government were prepared to meet.]

This factual pattern reflects that there were no "ends of justice" to be served by the delays in commencing Mr. Fogarty's trial. The trial court justified the continuance of Mr. Fogarty's trial on the basis of needed time for further preparation, though Fogarty and the Government were prepared and ready to proceed. The court refused to sever, though the co-defendants were unprepared to proceed and made every effort to postpone trial, only to plead guilty before the final trial date. The fifty-day delay in Mr. Fogarty's trial was unreasonable, and reflects a disregard for his rights, and for society's right to a speedy trial. United States v. Didier, 542 F.2d at 1188, n. 7. Fogarty's indictment should be ordered dismissed by this Court, so as to vindicate the

individual's and the public's interest in the prompt resolution of criminal charges. United States v. Lasker, 481 F.2d at 234.

CONCLUSION

For the reasons set forth above, this court should declare that the fifty-day delay in commencing Petitioner's trial violated his constitutional right to a speedy trial and should reverse the judgment of the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1323

United States of America,	*	
	*	
Appellee,	*	
	*	
v.	*	Appeal From the
	*	United States
Gregory Richard Fogarty,	*	District Court
	*	for the District
Appellant.	*	of South Dakota
	*	

Submitted: September 16, 1982

Filed: November 10, 1982

Before BRIGHT, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge

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FLOYD R. GIBSON, Senior Circuit Judge.

Gregory Richard Fogarty was convicted at a bench trial on stipulated facts of one count of conspiracy to import marijuana in violation of 21 U.S.C. §§ 952(a) and 96? (1976), and one count of conspiracy to possess marijuana with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846. Fogarty appeals his conviction, claiming (1) that the district court[1] should have granted his motion to dismiss the indictment under the Speedy Trial Act of 1974 and (2) that the classification of marijuana in the Federal Controlled Substances Act is arbitrary and capricious, violating the due process and equal protection mandates of the Fifth Amendment to the United States Constitution. We reject Fogarty's claims and affirm his conviction.

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[1]The Honorable Donald J. Porter, United States District Judge, District of South Dakota.

I. Factual Background

A federal grand jury indictment was handed down on August 19, 1981, charging Fogarty and six others with conspiracy to import and distribute marijuana. The indictment, which was made public on October 23, 1981,[2] culminated a lengthy and complicated Federal Drug Enforcement Administration investigation beginning January 20, 1980, when a DC-7 aircraft containing 26,000 pounds of marijuana (with an estimated street value of approximately $18 million) landed in north central South Dakota and was seized by local law enforcement officers. The indictment named ten unindicted coconspirators and alleged forty-five overt acts occuring at various places in eight states and three foreign countries.

Fogarty was arraigned on September 8, 1981 and was joined for trial with four other

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[2]Because some of the defendants were at large, the indictment remained sealed until October 23, 1981.

indicted coconspirators (codefendants). Beginning in mid-October, 1981, Fogarty's codefendants filed numerous pretrial motions. The district court issued an order on October 23, 1981 requiring all pretrial motions to be submitted by November 13, 1981, with the United States having until November 27, 1981 to respond and the defendants having an additional five days to file their replies. On November 2, 1981, the district court scheduled the defendants' trial for December 7, 1981.

Among the pretrial motions were the continuance motions filed by three of Fogarty's codefendants on October 15, 1981. While Fogarty did not join in these motions, he did file eight petrial motions of his own on November 16, 1981, including a motion to sever his trial from the other defendants and a motion to dismiss the indictment for failure to comply with the Speedy Trial Act.

On November 24, 1981, the district court issued an order granting the three codefendants' motion to continue and moving the

trial from December 7, 1981 to January 6, 1982. On December 10, 1981, the court denied Fogarty's motions to dismiss and to sever and, accordingly, determined that Fogarty would be tried along with his four coconspir-ator/codefendants on January 6, 1982. The remaining pretrial motions were disposed of on December 22, 1981.

Before January 6, 1982, Fogarty's four codefendants pled guilty under plea bargaining agreements. Fogarty was tried pursuant to stipulated facts on January 6, 1982. His right to raise the issues in the instant appeal were expressly preserved at trial.

II. Speedy Trial Act

Fogarty contends that his trial was not timely under the Speedy Trial Act of 1974, 18 U.S.C. § 3161-3174 (1976) (Act), and, therefore, the district court should have dismissed the indictment against him.

Fogarty specifically urges that the 119-day delay between his arraignment on

September 8, 1981 and the commencement of his trial on January 6, 1982 violated §3161(c)(1) of the Act which provides:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

Thus, assuming that Fogarty's arraignment on September 8, 1981 started the seventy-day count, a timely trial would have begun on November 16, 1981, barring periods of excludable delay.

However, § 3161(h) of the Act sets forth a list of various periods of delay which are to be excluded when computing the elapsed time within which the trial must commence. Two of these "excludable time" provisions apply in this case to bring Fogarty's trial on January 6, 1982 within the seventy-day limit.

First, § 3161(h)(1)(F) (as amended 1979), provides in relevant part:

> (h) The following periods of delay shall be excluded in computing the time within which . . . the trial of any such offense must commence:
>
> > (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to --
> >
> > . . . .
> >
> > (F) Delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

In this case, the court was faced with numerous overlapping pretrial motions which were pending continuously from October 15, 1981, when the three codefendants' continuance motions were filed, until December 22, 1981, when the district court finally disposed of the remaining pretrial motions. Section 3161(h)(1)(F) clearly requires automatic exclusion of the sixty-one days during which such pretrial motions were continuously

pending. United States v. Brim, 630 F.2d 1307, 1312-13 (8th Cir. 1980) cert. denied, 452 U.S. 966 (1981).

A second "excludable time" provision of the Act applies here to the thirty-day delay resulting from the district court's continuance of the trial date from December 7, 1981 to January 6, 1982. Section 3161(h)(8)(A) empowers the judge to grant a continuance motion if he finds that the "ends of justice" so require. That section also provides that any delay resulting from such a continuance shall be excluded from the computation of trial days so long as the trial court "sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." Section 3161(h)(8)(B) accordingly provides, in relevant part:

> (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance . . . are as follows:

> (ii) Whether the case is so unusual or so complex due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
>
> . . . .
>
> (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

In this case, the court clearly articulated on the record its reasons for continuing the defendants' trial date from December 7, 1981 to January 6, 1982. The court specifically noted the complexities of the instant

case due to the existence of seven defendants, ten unindicted coconspirators and forty-five alleged separate overt acts that took place over seven states and three foreign countries. The court also found that one of the codefendant's counsel had a significant trial conflict which neces-sitated a continuance to assure "continuity of counsel." We find these reasons valid and, therefore, agree with the district court's conclusion that "the ends of justice served by granting the motion for continuance . . . outweigh the best interests of the public and the individual defendants in a speedy trial." Accordingly, the thirty-one-day delay resulting from the continuance is excludable time under § 3161(h)(8)(A).

Finally, these exclusions of sixty-one and thirty days apply to Fogarty despite his failure to join the pretrial continuance motions and his unsuccessful attempt to sever. The Act specifically addresses the application of exclusions to multiple defendant cases such as this one. Section 3161(h)(7) provides that a court shall exclude:

> A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

We agree with the D.C. Circuit's view that "[this provision] is crucial in a case involving multiple defendants because it provides that an exclusion applicable to one defendant applies to all codefendants." United States v. Edwards, 627 F.2d 460, 461 (D.C. Cir.), cert. denied, 449 U.S. 872 (1980); accord, United States v. Manbeck, 514 F. Supp. 152, 154-55 (D. D.C. 1981). Applying this provision here, we note that: (1) Fogarty's severance motion was never granted and he was to be tried along with his coconspirators/codefendants; (2) the January 6, 1981 trial date was clearly timely as to Fogarty's codefendants who successfully sought continuances; (3) the district court properly determined that the delay resulting from the granting of the continuance motions was reasonable.

In view of the foregoing, the sixty-one days and thirty days of "excludable time"

should be subtracted from the 112 days which elapsed between Fogarty's arraignment and his trial. Hence, Fogarty's trial on January 6, 1981 was well within the seventy-day limit.

III. The Controlled Substance Act

Fogarty also contends that his conviction should be reversed because of the alleged unconstitutionality of the Federal Controlled Substance Act. 21 U.S.C. §§ 801-904 (1976) (CSA or Act). Specifically, Fogarty claims that classification of marijuana as a Schedule I controlled substance, [3] id. at § 812(b), Schedule I(c)(10), is irrational

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[3] The severity of statutory sanctions for drug distribution and related offenses depends on the schedule in which the drug is classified, with the most severe penalties typically attaching to Schedule I substances and the least severe penalties attaching to Schedule IV and V substances. 21 U.S.C. § 841(b). Congress made the initial classifications of controlled substances. However, recognizing that scientific information concerning controlled substances could change, Congress empowered the Attorney General to hear petitions for the reclassification or removal of drugs from the schedules. Id. at § 811.

and arbitrary, violating the due process and equal protection mandates of the Fifth Amendment to the United States Constitution. The gist of this claim is that the weight of current medical knowledge purportedly shows that marijuana does not satisfy the three statutory criteria necessary for inclusion in Schedule I -- (A) high potential for abuse, (B) no currently accepted medical use, and (C) lack of accepted safety for use of the drug under medical supervision. 21 U.S.C. § 812(b)(1). Fogarty places particular emphasis on the number of currently accepted medical uses for marijuana, including therapeutic uses in the treatment of glaucoma and cancer.

In addressing this argument, we first note the highly deferential standard of review applicable here. Because there is no fundamental constitional right to import, sell, or possess marijuana, the legislature classification complained of here must be upheld unless it bears no rational relationship to a legitimate government purpose. United States v. Kiffer, 477 F.2d 349, 352 (2nd Cir.

1972), cert. denied, 414 U.S. 831 (1973). Accordingly, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . . " New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Furthermore, judicial self-restraint is especially appropriate where as here the challenged classification entails legislative judgments on a whole host of controversial medical, scientific, and social issues. Marshall v. United States, 414 U.S. 417, 427 (1974); also see Kiffer, 477 F.2d at 352. As noted in Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1954): "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

With this in mind, we conclude that Fogarty has not met his heavy burden of proving the irrationality of the Schedule I clas-

sification of marijuana.[4] First, the ongoing vigorous dispute as to the physical and psychological effects of marijuana, its potential for abuse, and whether it has any medical value, supports the rationality of the continued Schedule I classification. See

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[4] In so holding we are in accordance with the heretofore uniformly held view among federal courts that the Schedule I classification of marijuana is rational and, therefore, not violative of equal protection or due process. See United States v. Kiffer, 477 F.2d 349, 356-57 (2d Cir. 1972), cert. denied, 414 U.S. 831 (1973); United States v. Erwin, 602 F.2d 1183, 1185 (5th Cir. 1979) (Attorney General's failure to reclassify marijuana did not violate defendant's equal protection or due process rights); United States v. Maiden, 355 F. Supp. 743, 749 (D. Conn. 1973); Mat. Org. for Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 140 (D. D.C. 1980) (Three Judge Court); Wolkind v. Selph, 495 F. Supp. 507, 513 (D. Va. 1980), aff'd, 649 F.2d 865 (5th Cir. 1981) (Virginia's Controlled Substances Act, which classified marijuana as a Schedule I substance, complied with equal protection and due process mandates); United States v. Creswell, 515 F. Supp. 1268, 1271 (E.D. N.Y. 1981) (DEA's decision not to reclassify marijuana was not arbitrary nor an abuse of discretion in view of the continued controversial effects of marijuana).

National Organization for Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 128-30, 136, 139-40 (D. D.C. 1980) (Three Judge Court) for Judge Tamm's excellent discussion of the current state of medical and scientific know-ledge concerning the uses and effects of marijuana. Furthermore, the three statutory criteria for Schedule I classification set out in § 812(b)(1) -- high potential for abuse, no medically accepted use, and no safe use even under medical supervision -- should not be read as being either cumulative[5] or exclusive.[6] Thus, even assuming, arguendo, that marijuana has some currently accepted medical uses, the Schedule I classification may nevertheless be rational in view of contervailing factors such as the current pattern, scope, and significance of marijuana abuse and the risk

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[5] See NORML v. Bell, 488 F. Supp. 140, Maiden, 355 F. Supp. 748-49, n.4.

[6] See 21 U.S.C. 811(c)(1)-(8), supra, which lists eight factors the Attorney General must consider in classifying a drug. Such factors include the current pattern of abuse, the risk to public health, and the scope and significance of abuse.

it poses to public health. See 21 U.S.C. § 811(c)(1)-(8). Finally, it should be noted that under Section 811 Congress has provided a comprehensive reclassification scheme, authorizing the Attorney General to reclassify marijuana in view of new scientific evidence. In establishing this scheme, Congress provided an efficient and flexible means of assuring the continued rationality of the classification of controlled substances, such as marijuana. See, Kiffer, 477 F.2d at 357.

Judgment affirmed. Costs assessed against Appellant.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED
December 10, 1981
WILLIAM F. CLAYTON
Clerk
pkl

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)CR.81-10017-01
	) ORDER
GREGORY RICHARD FOGARTY,	)
	)
Defendant.	)

The defendant Gregory Richard Fogarty having today in open court made an oral motion to dismiss the indictment for violation of the Speedy Trial Act, 18 U.S.C. § 3161, on the grounds that defendant Gregory Richard Fogarty did not join in the motions for continuance filed by co-defendants Terry Michael Halgrimson, Gerald J. Maiers, and Dennis Fogarty, which motion was granted by Order dated November 24, 1981, continuing the trial date from

December 7, 1981 until January 6, 1982, which, defendant Gregory Richard Fogarty claims, resulted in a violation of his rights as an individual defendant to a speedy trial, and the court having determined that the defendants named in this conspiracy indictment should be tried together, and having determined pursuant to 18 U.S.C. § 3161(h)(7) that the period of delay between December 7, 1981, and January 6, 1982, is not an unreasonable delay, and that the ends of justice served by granting the motion for continuance joined in by the other co-defendants and not objected to by defendant Gregory Richard Fogarty outweighed the best interest of the public and the individual defendants in a speedy trial, it is hereby

ORDERED that defendant's Motion is DENIED.

Dated December 10, 1981.

BY THE COURT:

[Donald J. Porter]
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: _____
Deputy

(SEAL OF COURT)

APPENDIX C

BOYCE, MURPHY, MCDOWELL & GREENFIELD
Attorneys at Law
505 Northwestern National Bank Building
P.O. Box 5015
Sioux Falls, South Dakota 57117

October 7, 1981

Honorable Donald J. Porter
United States District Judge
Room 413, U.S. Courthouse
Pierre, South Dakota 57501

RE: CR. 81-10017-01,02,05, and 06 USA vs. GREGORY RICHARD FOGARTY, TERRY MICHAEL HALGRIMSON, GERALD J. MAIERS and DENNIS FOGARTY

Dear Judge Porter:

This letter is in response to Ms. Russell's letter of October 5, 1981.

First, you should be informed that a fifth defendant has been arrested in California. His name is Gailard Radcliffe and it is my understanding he will have his removal hearing the beginning of next week.

It is the Government's position that we would like to have one trial for all five defendants. According to Ms. Russell's

letter the first deadline under the Speedy Trial Act is November 16, 1981. Obviously, it is our position that the trial should be held before that date unless defense counsel are successful on a Motion to Continue. The Government will not resist a Motion for Continuance by the defendants as long as the trial can be scheduled within a reasonable time.

Yours sincerely,

BOYCE, MURPHY,
MCDOWELL & GREENFIELD

James E. McMahon

JEM/cjm
cc: Jeffrey Viken
Mr. Drew Johnson
Mr. Ronald Mechbecher
Mr. Greg Batron
Paul Hinderaker
Mr. Dan Moan

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	*	
Plaintiff,	*	CR 81-10017
vs.	*	GOVERNMENT'S RESPONSE TO
GREGORY RICHARD FOGARTY, TERRY MICHAEL HALGRIMSON, GUILLAUME EUGENE HILLERS, GAILARD RADCLIFFE, GERALD J. MAIERS, DENNIS FOGARTY, LYNN MIZER,	*	MOTION FOR CONTINUANCE AND MOTION TO SUPPRESS EVIDENCE
Defendants.	*	

MOTIONS TO QUASH SEARCH WARRANTS AND SUPPRESS EVIDENCE

Terry Michael Halgrimson and Dennis Fogarty have submitted motions to quash search warrants and suppress evidence. The Government resists these motions on the

follow grounds:

1. Defendant Halgrimson and Defendant Dennis Fogarty have no standing to challenge the searches conducted in this case.

2. All searches conducted in this case were done so pursuant to valid search warrants.

3. There were sufficient exigent circumstances to justify a search without a search warrant.

4. The vehicles and other items that were searched had been abandoned.

5. Many of the items seized would fall under the plain view exception to the requirement of having a search warrant.

The Government requests a hearing be held on the Motion to Quash Search Warrants and Suppression Motions. A brief in oposition to

the Motion to Quash and Motion to Suppress will be filed with the Court after said hearing.

MOTION TO CONTINUE

Defendants Halgrimson, Maiers and Dennis Fogarty have moved for a continuance. The Government is prepared and stands ready to go to trial in this matter on December 7, 1981. However, the Government has no objection to the Court continuing this matter provided the Court finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the Defendant in a speedy trial and providing further that the trials for all of the defendants are continued so as not to result in separate trials.

Respectfully submitted,

D-4

BOYCE, MURPHY, MCDOWELL
& GREENFIELD

By [James E. McMahon]
James E. McMahon
Box 5015
Sioux Falls, SD 57117
Special Assistant
U.S. Attorney